

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Government,

HONORABLE GEORGE CARAM STEEH

v.

No. 15-20652

D-3 EUGENE FISHER,  
D-4 COREY BAILEY,  
D-6 ROBERT BROWN,  
D-13 ARLANDIS SHY,  
D-19 KEITHON PORTER,

Defendants.

JURY TRIAL

Tuesday, August 21, 2018

- - -

APPEARANCES:

For the Government:

JULIE FINOCCHIARO, ESQ.  
JUSTIN WECHSLER, ESQ.  
TARE WIGOD, ESQ.  
MARK BILKOVIC, ESQ.  
Assistant U.S. Attorneys

For the Defendants:

HENRY M. SCHARG, ESQ.  
On behalf of Eugene Fisher  
  
CRAIG DALY, ESQ.  
KEITH SPIELFOGEL, ESQ.  
On behalf of Corey Bailey  
  
JAMES FEINBERG, ESQ.  
On behalf of Robert Brown  
  
MARK MAGIDSON, ESQ.  
JOHN THEIS, ESQ.  
On behalf of Arlandis Shy

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STEVEN SCHARG, ESQ.  
On behalf of Keithon Porter

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*To Obtain Certified Transcript, Contact:*  
*Ronald A. DiBartolomeo, Official Court Reporter*  
*Theodore Levin United States Courthouse*  
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*Detroit, Michigan 48226*  
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*Proceedings recorded by mechanical stenography.*  
*Transcript produced by computer-aided transcription.*

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E X H B I T S

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N O N E

Detroit, Michigan

Tuesday, August 21, 2019

At 8:30 a.m.

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(Jurors resumed deliberations.)

(Proceedings held without jury at 10:12 a.m.)

**THE COURT:** You can take a seat.

Again, counsel has been talking with one another about suggested responses to the question.

For the record the question reads: We cannot reach a decision except Eugene Fisher, firearm and ammunition charges.

So Mr. Daly?

**MR. DALY:** Both sides have agreed to address the specific question. It's not a question actually, but a statement as to what their status is.

We are asking you to give the jury Court Instruction Number 64, Duty To Deliberate. We have modified just to take out the first sentence, and if I can approach, I will hand it to you, Judge.

**THE COURT:** Okay.

**MR. DALY:** And we think this would directly address their statement.

1                   **THE COURT:** Okay. I like the idea. I do  
2 feel that we should suggest to them that this is very  
3 early in their deliberations given the length of the  
4 trial, and the mountain of information presented.

5                   What I had written -- and I'm not led to any  
6 particular language -- but this is what I was just jotting  
7 down. It would go like this:

8                   This is been a very lengthy trial, and there's  
9 been a mountain of information presented. It's not  
10 unusual that you would have some difficulty in reaching an  
11 unanimous agreement. You have been deliberating for only  
12 two and a half days, and it is very early in your  
13 deliberations.

14                  You should make a special effort to maintain --  
15 this is in response to the shouting and vulgar language  
16 that was observed by other folks through the walls -- You  
17 should make a special effort to maintain a dispassionate  
18 posture in examining and discussing the evidence.

19                  Remember you're fact finders, not advocates. It  
20 is very destructive to your role and your relationships to  
21 become verbally aggressive or overly aggressive in your  
22 deliberation in the case.

23                  **MR. DALY:** Judge, we are strongly opposed to  
24 that for a number of reasons. Their deliberations are  
25 suppose to be secretive. We're not even suppose to be

1 hearing anything, and to comment on what's going on, I  
2 think --

3 **THE COURT:** Well, nobody heard words that  
4 were discernable except for some of the swear words  
5 apparently.

6 **MR. DALY:** We are invading the secrecy and  
7 privacy of deliberations. To comment on it in any way,  
8 shape or form, we're simply asking that you give the  
9 instruction that we have agreed on without any commentary  
10 about how long they have been deliberating, or what they  
11 should do, or what their role is. I think that's  
12 intrusive as to what's been going on, and it is far beyond  
13 what is necessary or what they are really looking for.

14 So what the parties have agreed to is what we have  
15 submitted. Any other commentary we would object.

16 **THE COURT:** Mr. Bilkovic?

17 **MR. BILKOVIC:** Your Honor, I agree with Mr.  
18 Daly in some respects. I agree with him with the  
19 rereading the Instruction 64 on deliberations would be  
20 present.

21 I don't necessarily have a problem with the Court  
22 telling them that it's been a lengthy trial. So go back  
23 and continue. I agree with Mr. Daly that the end portion  
24 about the caution about what's going in the jury room  
25 might not be appropriate at this point. They might think,

1 even though the Court has indicated we can't hear words,  
2 they might think that somebody is listening to them, and I  
3 certainly wouldn't want that to happen.

4 The other thing that we were suggesting, and I  
5 know the defense is oppose to it, is that the Court to let  
6 them know to continue to ask questions, and let them know  
7 if needed, if there is a transcript that they want to see,  
8 that we can make it available to them.

9 I know there was a question yesterday about  
10 Derrick Kennedy and some other transcripts. The Court  
11 told them not at this time. They might have lost the "not  
12 at this time", and think they cannot get them, and for all  
13 we know, they are arguing about something that Derrick  
14 Kennedy testified to, and somebody says he said this, and  
15 somebody said he said that, and they are not going to  
16 reconcile that because people recall it differently.

17 I don't think there is anything wrong suggesting  
18 to them that if there is specific transcripts that they  
19 want, that we could get them available for them.

20 **MR. DALY:** Well, what's wrong with it is that  
21 they have not asked for it. So the last time they asked  
22 for transcripts, you answered it. They have not come back  
23 and written a note and say, this is what we want. We want  
24 Kennedy transcripts, or we want this. It's pure  
25 speculation to now say to them, look it. If you want the

1 transcripts of Mr. Kennedy when they have not even asked  
2 for them, you're invading what the deliberation process of  
3 the jury by trying to speculate about what they may or may  
4 not want.

5 It would be fine if you said to them, if you have  
6 any other questions, put them in writing, and we'll do our  
7 best to answer them. That's fine, but to try to say, you  
8 know, well, if you want the Kennedy transcripts, or if you  
9 the Scott transcripts, or you want this, just trying to  
10 guess at it, that's not appropriate because they have not  
11 asked it.

12 I think our job is to address the questions or the  
13 comments, and not to go beyond it.

14 **MR. BILKOVIC:** Well, they did ask for it.  
15 They specific asked for Derrick Kennedy's transcript, and  
16 the Court at the time said not at this point. I'm not  
17 saying tell them now, by the way, if you want Derrick  
18 Kennedy's transcript, we can make it available for you.  
19 What I'm saying, when you're instructing them on what  
20 you're going to instruct them to, suggest to them that if  
21 they need any exhibits, they are available as they've been  
22 getting them, and if there are certain transcripts they  
23 want, we can make those available for them. I don't think  
24 there's anything harmful of that to let them know that if  
25 there is something they can't remember, we can help them



1 with that, especially in the light of the question they  
2 asked yesterday. I don't see anything wrong with that.

3 **MR. DALY:** Well, what's wrong with it is they  
4 are not asking for it. We're not trying to direct the  
5 jury towards a certain resolution on our own by trying to  
6 guess what they may or may not want, or what may or may  
7 not help them to get to a verdict. That's not our job.  
8 It's not the Court's job. It's not the government's job,  
9 and because they have not asked for anything specific,  
10 there's nothing to comment on, Judge. It's that simple.

11 They know whether that if they want exhibits, they  
12 can ask them. They have been doing that. If they have  
13 question, they know they can ask it. Let's not try to  
14 figure out what we think may push them in a certain  
15 direction when we don't really know. I don't think that's  
16 really helpful. I think it is invasive.

17 **MR. BILKOVIC:** And while I agree that they  
18 know they can ask for exhibits and get them, right now  
19 this jury may be thinking, because how that question was  
20 answered yesterday, if they need a transcript or want to  
21 review a transcript, tough luck. They can't get it.  
22 That's my concern, and I think it is an appropriate  
23 concern.

24 **MR. DALY:** That could be his concern, but  
25 that's not way to deal with it. Just because he may have

1 that particular concern, isn't what the jury is asking for  
2 at this point. They are not asking for a transcript.  
3 There is no reason to do this.

4 So whether it is a legitimate concern or not,  
5 doesn't address why we're trying to resolve this.

6 **THE COURT:** All right. So you've referred to  
7 this question that really isn't a question at all. It is  
8 an expression that they cannot reach a decision, except  
9 with respect to the firearm and ammunition charges  
10 involving Mr. Fisher, and the -- obviously, they want us  
11 to know that they are having difficulties, and I think it  
12 is reasonable for the Court to invite them if they have  
13 some ideas of what would assist them in carrying out their  
14 duties, to write a note as you suggested Mr. Daly, and we  
15 will attempt to assist them in their deliberations. I see  
16 nothing wrong with that.

17 On behalf of the government, Mr. Bilkovic do you  
18 object to that?

19 **MR. BILKOVIC:** I do not.

20 **THE COURT:** Mr. Daly, you do?

21 **MR. DALY:** Yes.

22 **THE COURT:** Well, I think we obviously want  
23 to reach a conclusion in this case, if it's possible to do  
24 so, and I think that the response should not be coercive  
25 or -- and so I will give the modified duty to deliberate

1 as the parties have agreed, but I think I will, as it  
2 relates to their expressed difficulties in reaching a  
3 decision, I think I will observe that they have been  
4 deliberating for only two and a half days, and that if  
5 they have ideas about what would assist them to carrying  
6 out their duties, they should communicate with the Court  
7 by note as instructed earlier.

8 And for the reasons argued by Mr. Daly, I'll  
9 refrain from cautioning them to -- by describing their  
10 role as fact finder, and the need -- the desirability of  
11 not becoming verbally aggressive or overly defensive in  
12 their considerations of the case, although I think that's  
13 part of the message they need to get. We can save that  
14 for the next expression of difficulty if there is one.

15 **MR. THEIS:** Your Honor, just briefly on the  
16 issue of the two and a half days, I agree that's an  
17 objective fact that's appropriate to tell them.

18 When you talked about your proposed instruction  
19 earlier, you said that it is fairly early in their  
20 deliberation. I would stick to just the objective part of  
21 it that it is two and a half days because there is no  
22 right or wrong or appropriate length, and it sort of  
23 implies that you're telling them that there is a certain  
24 amount of time. So if we can just leave it to the two and  
25 a half days, that would be our preference.

1                   **MR. SPIELFOGEL:** Your Honor, we should not be  
2                   telling them at all that we consider this early in the  
3                   deliberations or this is late in your deliberations.

4                   **THE COURT:** I agree with that, and I'm not  
5                   going to tell them that.

6                   **MR. SPIELFOGEL:** For them, this could be like  
7                   they've been back there for a month as far as how they  
8                   feel. For to us tell them this is early, get back there,  
9                   that's not our role.

10                  **THE COURT:** Right. Okay. Do you want to  
11                  receive the partial jury verdict that they said they  
12                  reached?

13                  **MR. H. SCHARG:** Pardon me?

14                  **THE COURT:** Did you want to entertain the  
15                  idea of receiving the partial verdict as it relates to --

16                  **MR. H. SCHARG:** We defer that to a later  
17                  time.

18                  **THE COURT:** Okay.

19                  **MR. H. SCHARG:** I don't think there's the  
20                  necessity to take that verdict. Obviously at some point  
21                  in time if the -- if a mistrial is declared on the other  
22                  counts, we can take the verdict at that time.

23                  **MR. BILKOVIC:** The government agrees with  
24                  that position.

25                  **THE COURT:** Okay.

1                   **MR. BILKOVIC:** Write this down. This is the  
2 first time that I've agreed with Mr. Scharg.

3                   **MR. H. SCHARG:** I didn't hear the last part.

4                   **MR. BILKOVIC:** The first time I've agreed  
5 with you in three months.

6                   **MR. H. SCHARG:** I thought it was  
7 intellectually dishonest.

8                   **THE COURT:** All right. Let's call the jurors  
9 in.

10

11                   (Proceedings with jury at 10:29 a.m.)

12

13                   **THE COURT:** All right, folks. You can take a  
14 seat.

15                   So the Court has received your note. It reads:  
16 We cannot reach a decision except Eugene Fisher, firearm  
17 and ammunition charges.

18                   The Court is going to respond as follows:

19                   It is your duty to talk to each other about the  
20 evidence and to make every reasonable effort that you can  
21 to reach unanimous agreement.

22                   Talk with each other. Listen carefully and  
23 respectfully to each other's views, and keep an open mind  
24 as you listen to what your fellow jurors have to say. Try  
25 your best to work out your differences, but don't hesitate

1 to change your mind if you are convinced that other jurors  
2 are right and your original position was wrong. Don't  
3 ever change your mind just because other jurors see things  
4 differently, or just to get the case over with. In the  
5 end your vote must be that, exactly your own vote.

6 It is important for you to reach unanimous  
7 agreement, but only if you can do so honestly and in good  
8 conscience. No one will be allow to hear your discussions  
9 in the jury room, and no record will be made what you say.  
10 You should all feel free to speak your own minds. Listen  
11 carefully to what the other jurors have to say, and then  
12 decide for yourself if the government has proved a  
13 defendant guilty beyond a reasonable doubt.

14 So with that, we'll direct you to go back and  
15 continue your deliberations.

16  
17 (Jurors excused and continued deliberating at 10:32 a.m.)  
18

19 **THE COURT:** You can take that seat.

20 So I have Mr. DiBartolomeo working on the  
21 transcript of Derrick Kennedy's testimony in case they  
22 come back with that request. He is charged with deleting  
23 from the transcript sidebar conferences, and any other  
24 exchanges that are not within the province of the jury to  
25 receive, so that if such a request is made, we can

1 respond.

2 This has been a little bit against my better  
3 judgment. It seems to me that the Court should have  
4 cautioned them to make a special effort to maintain a  
5 dispassionate posture in examining and discussing the  
6 evidence, remembering that they are fact finders and not  
7 advocates.

8 So I haven't -- I decided to go with your  
9 agreement, but I don't think it is especially helpful to  
10 the jury, and I'm sure you could observe the misery on  
11 their faces as they came into the courtroom. I think they  
12 need a pep talk of some kind, and you might discuss  
13 further the appropriate response, something like a  
14 response that I suggested.

15 With that we'll --

16 **MR. BILKOVIC:** Your Honor, we may have  
17 misunderstood. I thought the Court was going give them a  
18 little bit of nudge, and let them know to continue ask  
19 questions and things like. Did the Court decide not to do  
20 that?

21 **THE COURT:** Right.

22 **MR. WECHSLER:** We have been talking the whole  
23 time. Part of the problem of not addressing transcript  
24 issues is that when they ask for specific exhibits the  
25 first time, the very first time, we sent back with them a

1 list of exhibits and said, choose what you want, and then  
2 they came back and asked for the transcripts from the  
3 trial, more specifically Derrick Kennedy, and we sent them  
4 back and said, well, not at this time, but "not at this  
5 time" appeared to sort of bury the rest of it, which is  
6 your duty to collective memories and whatnot.

7 Without getting into their minds, the problem is  
8 that they likely don't believe they can get transcripts,  
9 and so without saying that those are available or anything  
10 that you need related to the trial is available or some  
11 consideration of that, because we sent them an exhibit  
12 list and said, pick out what you want, they may be  
13 thinking this is all that we can get, especially in light  
14 of the fact they asked for the transcripts of the trial,  
15 and we essentially said no.

16 So that's the concern that we have over here with  
17 just leaving it as the instruction as indicated.

18 **MR. DALY:** Judge, this is not a fishing  
19 expedition where one side or the other tries to figure out  
20 what's going on with the jury. That's not our job.

21 **MR. WECHSLER:** It was not a fishing  
22 expedition.

23 **MR. DALY:** That's exactly what they're  
24 engaging in now. They are trying to figure out what the  
25 jury may or may not want, and that's not our job.



1                   **MR. WECHSLER:** Sorry to interrupt. I agree,  
2 but it's not fishing because we had a note where they  
3 specifically asked for transcripts from the trial,  
4 specifically Derrick Kennedy. That's not out of the blue.  
5 This is what they asked for, and as we discussed  
6 yesterday, we said at this time, and --

7                   **MR. DALY:** So what's different now, other  
8 than they said that they believe that they are hung, and  
9 now you're trying to go back to an issue that we already  
10 agreed that the jury will be instructed in a certain way,  
11 and that's really the end of the discussion for now,  
12 unless they write back and have a specific request for  
13 transcripts of a particular witness, and then we can deal  
14 with it.

15                   **MR. WECHSLER:** But they did, and we.

16                   **MR. DALY:** That's in the past.

17                   **MR. WECHSLER:** It's in past, but --

18                   **THE COURT:** We need to take a short break.

19  
20                   (Recess taken at 10:38 a.m.)

21  
22                   (Proceedings resumed without jury at 11:09 a.m.)

23  
24                   **THE COURT:** Okay. So listening to counsel's  
25 argument, I think, again, I did intend and didn't address

1 the invitation to have the jurors suggest ways that the  
2 Court could assist them to reach an agreement in the case,  
3 and I think at this point it is just as well that they not  
4 be advised unless there's another note that comes out  
5 expressing their inability to reach an outcome.

6 So we'll wait for that next communication if there  
7 is one to come.

8  
9 (Recess taken at 11:11 a.m.)

10  
11 (Proceedings adjourned for the day at 2:30 p.m.)

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C E R T I F I C A T I O N

I, Ronald A. DiBartolomeo, official court reporter for the United States District Court, Eastern District of Michigan, Southern Division, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript has been prepared by me or under my direction.

s/Ronald A. DiBartolomeo  
Ronald A. DiBartolomeo, CSR  
Official Court Reporter

\_\_\_\_February 4, 2019  
Date

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